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No. (1)

In The

# Supreme Court of the United States

KAREN HARTSTEIN,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) Whether a federal criminal defendant's mandatory sentence of restitution based on a sentencing judge's determination of facts not charged in the indictment, not found by the jury and not admitted by defendant, if considered a criminal penalty, violates the Fifth and Sixth Amendments, under the pronouncements of *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 453 U.S. 220 (2005).

(2) Whether a federal criminal defendant's mandatory order of restitution based on a sentencing judge's determination of facts which were not alleged in any pleading, not found by the jury and not admitted by the defendant, if considered a civil remedy, violates the Fifth and Seventh Amendments, as applied in *Curtis v. Loether*, 415 U.S. 189 (1974).

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Karen Hartstein, by and through her counsel of record, respectfully petitions this Court for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Eighth Circuit filed on August 27, 2007.

## OPINIONS BELOW

The United States District Court in the Eastern District of Missouri entered its Judgment in a Criminal Case on July 13, 2006, including its order for restitution. *United States v. Karen Hartstein*, No. 04:05CR186-CEJ. A copy of that Judgment is attached as App. 27-34. The District Court also denied Petitioner's post sentencing motion to correct the restitution portion of the sentence on August 15, 2006. A copy of that order is attached hereto as App. 25. The United States Court of Appeals for the Eighth Circuit in a published opinion on August 27, 2007 ruled against Petitioner on the restitution issue raised by this petition for writ of certiorari and reversed and remanded on unrelated issues. *United States v. Karen Hartstein*, ___ F.3d ___ (8th Cir. August 27, 2007). A copy of that decision is attached as App. 1-24.

## JURISDICTION

The jurisdiction of the District Court was invoked by the United States of America on April 7, 2005 when Petitioner Karen Hartstein was charged in a fifty-three count indictment in the Eastern District of Missouri with various offenses under 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1343 (wire fraud) and 18 U.S.C. § 1029 (unlawful use of credit device). The District Court had original jurisdiction over the underlying criminal case pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction of offenses against the United States.

Petitioner plead guilty to two counts and the District Court entered its Judgment in a Criminal Case on July 13, 2006. App. 27-34. The District Court for the Eastern District of Missouri is located within the jurisdiction of the United States Court of Appeals for the Eighth Circuit. 28 U.S.C. § 41. Petitioner filed a timely notice of appeal to the Eighth Circuit.

Jurisdiction is conferred on the United States Court of Appeals for the Eighth Circuit by 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The Eighth Circuit published its decision on August 27, 2007. App. 1-24. This petition is timely filed within 90 days of that date. Review by certiorari is sought pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**The Fifth Amendment** to the United States Constitution provides, in relevant part: "No person shall be . . . deprived of life, liberty or property without due process of law."

**The Sixth Amendment** to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . "

**The Seventh Amendment** to the United States Constitution provides, in relevant part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . "

**Title 18 §3663A** (Mandatory Victims' Restitution Act) provides, in pertinent part:

> (a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offence described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense, or, if the victim is deceased, to the victim's estate.
>
> (2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution

> may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

## STATEMENT OF THE CASE

This case raises questions of the constitutionality of determining restitution without affording federal criminal defendants either the Sixth Amendment's jury guarantee if mandatory restitution is considered a criminal penalty or the Fifth and Seventh Amendment's jury guarantee if restitution is considered a civil remedy.

Petitioner plead guilty to two counts of a fifty-three count indictment involving credit card fraud and solicitation of fraudulent loans. At her sentencing, Petitioner contested both the fraud loss and restitution amounts. Her attorney asserted that she owed no more than $970,000 in restitution even if every loan she obtained in her own name over a three

year period was deemed fraudulent. The District Court ordered $2,089,455.06 in restitution to more than 180 "victims," most of whom were not even named in the indictment, and only one of whom testified at the sentencing hearing. The Court did so without submitting the restitution issues to a jury and without obtaining a waiver of Petitioner's Fifth and Sixth Amendment rights as specifically recognized in *United States v. Booker*, 453 U.S. 220 (2005).

The total loss amount specifically alleged in the fifty-three count indictment was $347,000 involving only 25 alleged victims. No specific restitution amount was sought in the indictment. The two counts to which Petitioner plead involved only two victims and the loss amount stipulated to was $34,302. Yet both Petitioner's loss amount, which determined her advisory sentencing range under the Federal Sentencing Guidelines, and restitution as determined by the Court were based on over 180 alleged victims.

Despite Petitioner's fact-based challenges at sentencing concerning many of the alleged fraudulent loans and the characterization of many individuals as "victims," the government produced only one "victim" to testify about a loan she made to Petitioner. No evidence was presented to prove restitution amounts. The District Court accepted the Government's accounting summaries and legal arguments and sentenced Petitioner to 135 months and ordered her to pay $2,089,455.60 restitution to victims who are not specified in the sentencing order. App. 34. The Court also denied Petitioner's Motion to Correct this

restitution order based, in part, on the repayments which had been made to many of the victims. App. 25.

On appeal, Petitioner raised a number of challenges. Among those was that the District Court erred in relying on the Government's financial summaries and by not requiring the Government to carry its burden of proving the loss amounts.

Petitioner also argued that the District Court erred in ordering the restitution amounts because these amounts were not charged in the indictment and Petitioner neither admitted to them nor did a jury find them beyond a reasonable doubt. As such, the restitution ordered pursuant to the Mandatory Victims' Restitution Act (MVRA), 18 U.S.C. §§ 3663A(a)(1), (c)(1)(A)(ii), violated the Fifth and Sixth Amendments and this Court's holdings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005).

In the alternative, if restitution is considered a civil remedy rather than a criminal penalty, Petitioner asserted that her restitution order violated the Fifth and Seventh Amendments' guarantee that the contested restitution, which is to be paid to individuals and not the government, also be accorded due process and be submitted to a jury.

The Eighth Circuit held that the Government had failed to carry its burden of proving both loss and restitution amounts, and reversed and remanded for

further fact finding. As concerns Petitioner's constitutional challenges to the mode of determining restitution in federal criminal cases, the Eighth Circuit summarily dismissed the entire issue: "We have previously held that restitution orders do not raise *Booker* concerns. *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005)." App. 24. The Court did not address Petitioner's issue concerning ordered restitution being a civil rather than a criminal penalty and, therefore, subject to the restrictions of the Fifth and Seventh Amendment regarding the right to a jury trial.

The case was remanded for another non-jury hearing and for additional determinations to be made by the Judge as to both Sentencing Guidelines and restitution. Petitioner contends that this procedure concerning her restitution determination will be in violation of her Fifth, Sixth and/or Seventh Amendment rights and submits that this Court should resolve these issues now. The position and decision of the Eighth Circuit Court of Appeals on this issue is clear and there is no reason to delay review by this Court pending further proceedings below.

## REASONS FOR GRANTING THE WRIT

### I. CERTIORARI IS APPROPRIATE TO DECIDE A QUESTION OF GENERAL PUBLIC IMPORTANCE: WHETHER MANDATORY RESTITUTION, IF CONSIDERED PART OF A DEFENDANT'S CRIMINAL PENALTY, CAN BE BASED ON THE SENTENCING JUDGE'S DETERMINATION OF FACTS NOT CHARGED IN THE INDICTMENT, NOT FOUND BY A JURY AND NOT ADMITTED BY THE DEFENDANT, WITHOUT VIOLATING THE FIFTH AND SIXTH AMENDMENTS.

The Mandatory Victims Restitution Act (MVRA) requires that a court order restitution when a defendant has been convicted of an offense against property, including an offense committed by fraud or deceit. 18 U.S.C. §§ 3663A(a)(1), (c)(1)(A)(ii). The MVRA provides that in most criminal cases "The Court shall . . . order that the Defendant make restitution to the victim of the offense". Any dispute as to the amount or type of restitution "shall" be resolved by the sentencing court by a preponderance of the evidence. 18 U.S.C. § 3664. Thus, Congress has established a scheme whereby restitution in criminal cases is *mandatory*, need not be charged in the indictment, need not be admitted by the defendant or found by a jury, can be based on judge-found facts at sentencing and need only be proved by the civil standard of proof.

Given this statutory scheme in service to criminal laws with their full panoply of constitutional protections, not surprisingly the issue of whether restitution is a criminal penalty or civil remedy is unsettled. Yet restitution continues to be ordered as a mandatory part of the sentence in virtually every federal property crime conviction without any direction as to what constitutional safeguards are required in light of *Blakely* and *Booker*, *supra*. It has been the "orphan" of federal sentencing jurisprudence and, therefore, this case presents the Court an opportunity to resolve these important issues and also to resolve certain conflicting opinions of the Courts of Appeals.

Most recently, this Court in *Pasquantino v. United States*, 544 U.S. 349 (2005), appeared to take the position in dicta that restitution is a criminal penalty. The *Pasquantino* defendants were convicted of wire fraud in their scheme to smuggle liquor to Canada from the United States without paying taxes. This Court stated:

> Petitioners answer that the recovery of taxes is indeed the object of this suit, because restitution of the lost tax revenue to Canada is required under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. §§ 3663A-3664 (2000 ed. and Supp. II). We do not think it matters whether the provision of restitution is mandatory in this prosecution. Regardless, the wire fraud statute advances the Federal Government's independent interest in punishing fraudulent domestic criminal conduct, a significant feature absent

> from all of petitioners' revenue rule cases. The purpose of awarding restitution in this action is not to collect a foreign tax, but to mete out appropriate criminal punishment for that conduct.

*Pasquantino*, 544 U.S. at 365; *see also Kelly v. Robinson*, 479 U.S. 36, 50-53 (1986).

Most Circuits have similarly concluded that restitution is a "criminal penalty." *United States v. Ziskind*, 471 F.3d 266, 270 (1st Cir. 2006); *United States v. Thompson*, 113 F.3d 13, 15 n.1 (2d Cir. 1997); *United States v. Edwards*, 162 F.3d 87, 89-90 (3d Cir. 1998); *United States v. Richards*, 204 F.3d 177, 213 (5th Cir. 2000); *United States v. Bearden*, 274 F.3d 1031, 1042 n.4 (6th Cir. 2001); *United States v. Baggett*, 125 F.3d 1319, 1321-22 (9th Cir. 1997); *United States v. Siegel*, 153 F.3d 1256, 1260 (11th Cir. 1998); *United States v. Rezaq*, 134 F.3d 1121, 1141 n.13 (D.C. Cir. 1998).

Only two Circuits have concluded that restitution is not in the nature of a criminal penalty but designed rather to make victims whole and as such constitutes a civil remedy. *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005); *United States v. Nichols*, 169 F.3d 1255, 1279-80 (10th Cir. 1999).

The Eighth Circuit has not been entirely clear on this issue. In *United States v. Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997), the Eighth Circuit discussed whether restitution under MVRA would be an unconstitutional violation of the Ex Post Facto Clause

and by implication placed restitution in the "criminal penalty" category. In *United States v. Ross*, 279 F.3d 600, 608-10 (8th Cir. 2002), the Eighth Circuit in like vein discussed whether *Apprendi*'s jury guarantee applies to restitution. But in *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005), the *Carruth* majority stated: "Restitution is designed to make victims whole, not to punish perpetrators, . . . it is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality."

Similarly, the Eighth Circuit was not clear on what basis it dismissed Petitioner's claim that her restitution order, whether considered a criminal penalty or a civil remedy, violated the Fifth and either the Sixth or Seventh Amendments when it merely held: "We have previously held that restitution orders do not raise *Booker* concerns." App. 24.

In any event, Petitioner asserts that if restitution is considered a "criminal penalty" then the Fifth and Sixth Amendment guarantees and this Court's line of decisions expanding the scope of these guarantees were violated by the District Court's order of restitution below.

In *Apprendi*, this Court held that any fact other than the fact of a prior conviction which increases the penalty of a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. Those Circuits which have addressed whether

*Apprendi* applied to restitution orders concluded that it did not because there is no "prescribed statutory maximum" under the restitution statutes.[1] *See, e.g., United States v. Syme*, 276 F.3d 131, 159 (3d Cir. 2002); *United States v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000); *United States v. Bearden*, 274 F.3d 1031, 1042 (6th Cir. 2001).

Four years after *Apprendi,* in 2004 this Court in *Blakely* held that the maximum sentence a judge may impose is one based solely on the facts reflected in the jury verdict or admitted by the defendant. *Blakely*, 542 U.S. at 303. However, the circuit courts which have considered whether *Blakely*, in conjunction with *Apprendi*, applied to restitution orders have concluded yet again that determinations of restitution under the MVRA have no Sixth Amendment protections. *See, e.g., United States v. Trala*, 386 F.3d 536, 547 n.15 (3d Cir. 2004); *Carruth*, 418 F.3d at 904;

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[1] An earlier restitution statute, the Victim and Witness Protection Act (VWPA), 18 U.S.C. § 3663, gave discretion to sentencing courts to order restitution, rather than making it mandatory as under the MVRA. But for purposes of determining whether the Sixth Amendment applies to restitution orders under either of these two statutes, a number of courts have noted that the distinction between the permissive language of the VWPA and the mandatory language of the MVRA is immaterial. *See, e.g., United States v. Leahy*, 438 F.3d 328, 335 (3d Cir. 2006) (quoting *Pasquantino,* 125 S.Ct. at 1777), noting that whether restitution is mandatory or discretionary does not change the government's interest in enforcing orders of restitution. Petitioner disagrees with this conclusion for the reasons stated herein.

*United States v. DeGeorge*, 380 F.3d 1203, 1221 (9th Cir. 2004); *United States v. Wooten*, 377 F.3d 1134, 1144 n.1 (10th Cir. 2004). In effect, these opinions do not recognize any change required with regard to mandatory restitution procedures in light of the sentencing changes made in *Blakely, supra*.

But as Judge Bye's dissent in the Eighth Circuit's *Carruth* decision noted, after *Apprendi* the *Blakely* holding "dictates a conclusion that any dispute over the amount of restitution due and owing a victim of a crime must be submitted to a jury and proved beyond a reasonable doubt." *Carruth*, 418 F.3d at 905. Assuming that restitution is a criminal penalty as the majority of the Circuits have concluded, "the proverbial *Apprendi* dominos begin to fall." *Id.*

Although there might have been a basis pre-*Blakely* for the courts to hold that *Apprendi* does not apply to restitution because restitution statutes do not provide a "statutory maximum," post-*Blakely* the concept of a "statutory maximum" underwent a fundamental shift. This is so because *Blakely* defines "the statutory maximum for *Apprendi* purposes" as the maximum sentence a judge can impose solely on the basis of the facts reflected in the jury verdict or admitted by the Defendant. *Blakely*, 542 U.S. at 303.

As succinctly stated by Justice Stevens in *Booker*:

> Accordingly we reaffirm our holding in *Apprendi*: any fact (other than a prior conviction) which is necessary to support a sentence exceeding **the maximum authorized by the facts established by a plea of guilty or a**

> **jury verdict** must be admitted by defendant or proven to a jury beyond a reasonable doubt. 543 U.S. at 228 (emphasis supplied).

Obviously, this Court's evolving Sixth Amendment jurisprudence did not end with *Apprendi* or even with *Blakely*. This Court in *Booker* held that the United States Federal Sentencing Guidelines would be unconstitutional but for the fact that the Court determined that the Guidelines are not mandatory but merely advisory. *Booker*, 543 U.S. at 244.

Despite the underlying *Booker* rationale, every Circuit to have examined the issue of whether *Booker* provides a Sixth Amendment right to have a jury determine mandatory restitution has concluded that it does not. *United States v. Ziskind*, 471 F.3d 266, 269 (1st Cir. 2006); *United States v. Leahy*, 438 F.3d 328, 344 (3d Cir. 2006); *United States v. Sosebee*, 419 F.3d 451, 462 (6th Cir. 2005); *United States v. Idriss*, 436 F.3d 946, 950 (8th Cir. 2006); *United States v. Williams*, 445 F.3d 1302, 1310 (11th Cir. 2006).

However, these decisions assert the same old basis for denying Sixth Amendment protections to restitution orders as the pre-*Booker* holdings did, i.e., that there is no "statutory maximum" contained in the VWPA or the MVRA so therefore there are no *Apprendi, Blakely* or *Booker* issues. But what none of the post-*Booker* decisions examine is the change which *Blakely* and *Booker* made to *Apprendi*; the concept of "statutory maximum" and the fundamental and underlying contradiction between a *mandatory* criminal penalty imposed pursuant to the Mandatory

Victims Restitution Act and the *Booker* holding that criminal penalties/sentences under the Federal Sentencing Guidelines are *advisory*. The *Booker* "package" of opinions does not turn on the *Apprendi* concept of a "statutory maximum" being exceeded, but on whether judicial fact finding determines a mandatory sentence. If it does then the Fifth and Sixth Amendments are violated unless a defendant has clearly waived those constitutional protections.

It must be recalled that the only reason the Federal Sentencing Guidelines survived the constitutional attack in *Booker* was, of course, Justice Breyer's remedial opinion holding that the Guidelines are advisory rather than mandatory. *Booker*, 543 U.S. at 244. But, the *Booker* challenge came on the heels of this Court's expanding Sixth Amendment jurisprudence vis-à-vis *Apprendi* and *Blakely* and only succeeded because of this Court's expansion of criminal defendants' Sixth Amendment rights in those decisions.

**Unfortunately, the *Booker* Court did not have before it the issue of the mandatory nature of restitution under the MVRA and thus did not examine the question of whether the unconstitutional infirmities that attached to the mandatory Guidelines similarly attached to the criminal penalty of mandatory restitution.** This is a question which cries for clear direction from this Court, particularly in view of the thousands of cases in which restitution is ordered each year.

In sum, Petitioner asserts that *Apprendi, Blakely* and *Booker* broadened her Fifth and Sixth Amendment rights to include all sentencing factors which must be applied *mandatorily*, such as her restitution order under the MVRA.

The indictment in this case said nothing about restitution and specifically charged loss amounts totaling only $347,000. Petitioner pled guilty to only two counts involving two specific victims and stipulated that the loss on these two counts was $34,302. At the sentencing hearing her attorney asserted that the total restitution amount for all victims (including those not mentioned in the indictment) could be no more than $970,000, even if every loan she obtained in her own name over a three year period was deemed fraudulent, a premise which she denies.

Petitioner at no time specifically waived her right to a grand jury indictment charging restitution liability, her right to a trial by jury on this issue or her right to proof beyond a reasonable doubt. Nevertheless, the District Court ordered restitution payments to about 180 "victims" totaling $2,089,455.00, six times the amounts charged in the indictment and sixty one times the amount of loss to which Petitioner stipulated.

Petitioner respectfully asserts that because the *Booker* "remedy" of declaring the Sentencing Guidelines "advisory" has not and cannot be applied to orders under the "Mandatory Victims' Restitution Act," without further direction from the Court. The

MVRA statute, as it now stands, is unconstitutional and the restitution order entered below is in violation of Petitioner's rights under the Fifth and Sixth Amendments, not withstanding the Eighth Circuit's summary dismissal of the constitutional challenge.

## II. ALTERNATIVELY, CERTIORARI IS APPROPRIATE TO DECIDE WHETHER MANDATORY RESTITUTION, IF CONSIDERED A CIVIL REMEDY, CAN BE BASED ON THE SENTENCING JUDGE'S DETERMINATION OF FACTS NOT ALLEGED IN ANY PLEADING, NOT FOUND BY A JURY AND NOT ADMITTED BY THE DEFENDANT, WITHOUT VIOLATING THE FIFTH AND SEVENTH AMENDMENTS.

As noted above, a number of Circuits have concluded that restitution ordered in a criminal case is a civil remedy, designed to make the victim whole. *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005); *United States v. Nichols*, 169 F.3d 1255, 1279-80 (10th Cir. 1999); *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005). However, such a concept should not abrogate the right to a jury trial on disputed facts pertaining to mandatory restitution.

The Seventh Amendment to the United States Constitution provides, in relevant part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . " Petitioner asserts that the Seventh Amendment overrides any power Congress had to

legislate any mandatory civil remedy such as that contained in the MVRA without permitting contested monetary issues to be resolved before a jury, particularly where the beneficiaries of a restitution order are individuals and not the Government.

This Court has held that the Seventh Amendment applies to actions enforcing a statutory right and requires a jury trial if the statute creates legal rights and remedies enforceable in an action for damages in the ordinary courts of law. *Curtis v. Loether*, 415 U.S. 189, 193-94 (1974). Although at issue in *Curtis* was damages on a civil rights claim pursuant to 42 U.S.C. § 1981, the MVRA similarly creates a statutory right that permits victims to become the beneficiaries of restitution collected by the Government and also to proceed in a civil court to collect on the restitution ordered in a criminal case. *See, e.g., United States v. Phillips*, 303 F.3d 548 (5th Cir. 2002).

The Seventh Amendment jury trial right in civil monetary disputes has been considered and upheld in a wide variety of civil actions. *See Cooper Industries v. Leatherman Tool Group*, 532 U.S. 424 (2001) (because a jury's award of punitive damages is not a finding of "fact" appellate review of the District Court's determination that an award is consistent with due process does not implicate the Seventh Amendment); *Allen v. International Truck and Engine Corporation*, 358 F.3d 469 (7th Cir. 2004) (the district court erred in concluding that Seventh Amendment concerns foreclosed certification of a class under

Fed. R. Civ. P. 23(b)(2)); *In re Technology Licensing Corp.*, 423 F.3d 1286 (Fed. Cir. 2005) (discussing the Seventh Amendment right to jury trial in legal actions for damages but not equitable actions).

In sum, the Seventh Amendment right to a jury trial where the controversy involves $20 or more is a notion that is alive and well in American jurisprudence. If Petitioner's $2,089,455.60 restitution order is in the nature of a civil remedy pursuant to which her alleged victims are possibly to be made whole, then Petitioner had a constitutional right to have this monetary controversy properly pled or otherwise noticed then heard and decided by a jury.

As matters proceeded however, she was denied the jury right as well as her due process right to be given notice at the outset concerning the identities of persons claiming to have suffered a loss and the circumstances and amounts of those alleged losses. Instead, Petitioner was given "Bargain Basement Justice" under the MVRA. The Court should, therefore, carefully examine this procedure, and provide direction for the thousands of mandatory restitution proceedings which are now occurring in the federal courts and will occur in the future.

## CONCLUSION

For the foregoing reasons, Petitioner suggests that her case warrants this Court's grant of certiorari.

Respectfully submitted,

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*Attorney for Petitioner*
*Karen Hartstein*

**United States Court of Appeals**
**FOR THE EIGHTH CIRCUIT**

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No. 06-2909

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| United States of America, | * | |
| Plaintiff-Appellee, | * | Appeal from the |
| | * | United States District |
| v. | * | Court for the Eastern |
| Karen Hartstein, | * | District of Missouri. |
| Defendant-Appellant. | * | |

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Submitted: March 13, 2007
Filed: August 27, 2007

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Before MELLOY, SMITH, and BENTON, Circuit Judges.

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MELLOY, Circuit Judge.

Karen Hartstein appeals the 135-month sentence she received after pleading guilty to two counts of a fifty-three count indictment involving credit card fraud and the solicitation of fraudulent loans from a large number of victims. Hartstein's sentence was based on a finding by the district court that her fraud involved a loss amount in excess of $2.8 million and over 180 victims. She also appeals an order to pay

over $2 million in restitution to her victims. Because additional factfinding is required as to the loss amount and number of victims, we vacate the sentence and restitution order and remand for further proceedings.

## I. Background

Hartstein worked as a travel agent. In this capacity, she solicited loans from numerous victims, promising to repay their principal within a short time period – typically thirty days – and give them free travel benefits including cruises and first-class airline tickets. Hartstein's scheme expanded to the point where she was soliciting new loans to pay the principal on old loans in whole or in part or to purchase airline tickets to appease her prior lenders. She eventually used clients' personal information and credit card numbers to open new lines of credit or to purchase tickets. In addition, she left vendors or cooperating travel agents with unpaid bills and "repaid" some lenders with bad checks. Also, as to a few clients who complained loudly, she provided one-way international tickets that she represented as round-trip tickets, thus leaving these clients stranded in foreign countries. In one instance, the stranded traveler was a minor. The government characterizes Hartstein's crime as a Ponzi scheme. Hartstein characterizes her activities as borrowing that spiraled out of control in which some lenders were the victims of fraud and other lenders were friends or

acquaintances who gave or loaned her money apart from any fraud.

Hartstein pleaded guilty to one count of mail fraud in violation of 18 U.S.C. § 1341, and one count of account fraud using an "access device" in violation of 18 U.S.C. § 1029(a)(2). In a subsequently prepared presentence investigation report ("PSR"), the probation office alleged that there were over 180 victims with a combined total amount of loans and unauthorized charges over $2.8 million. Applying the 2004 Guidelines, these figures resulted in a base offense level of seven, U.S.S.G. § 2B1.1(a)(1); an eighteen-level increase for a loss amount greater than $2.5 million but less than $7 million, U.S.S.G. § 2B1.1(b)(1)(J); and a four-level increase for more than fifty but fewer than 250 victims, U.S.S.G. § 2B1.1(b)(2)(B). In addition, there was a two-level increase for the unauthorized use of a means of identification, U.S.S.G. § 2B1.1(b)(10)(C)(I); a two-level increase for the use of sophisticated means, U.S.S.G. § 2B1.1(b)(9)(C); and a two-level upward adjustment for the abuse of a position of trust, U.S.S.G. § 3B1.3. This resulted in an initial PSR recommendation that the total offense level should be set at thirty-five. Hartstein had no criminal history points and was in criminal history category I. The PSR's resultant advisory Guidelines range was 168-210 months' imprisonment.

Hartstein objected to the PSR. In a detailed memorandum, she presented a series of arguments to establish that the amount of loss was substantially

lower than the $2.8 million listed in the PSR. The $2.8 million figure was the total amount purportedly loaned by Hartstein to all alleged victims without reduction for amounts repaid and without reduction for travel benefits granted. Hartstein expressly challenged the factual basis of many of the loans and the characterization of certain individuals as victims. She also argued generally that she was entitled to credit against each individual loan the principal sums repaid to the associated victim and the value of travel benefits provided to that victim. Her arguments can be categorized in three separate groups, as follows.

First, Hartstein challenged the government's listing of purported losses as factually inaccurate. She asserted that many of the victims were not, in fact, victims of an interrelated Ponzi scheme as alleged by the government, but were (1) friends or relatives who loaned or gave her money out of kindness, or (2) lenders who were unrelated to an alleged scheme. She also asserted that the government's listing of loss amounts for several victims was inaccurate, redundant, or not supported by the evidence. For example, Hartstein alleged that some victims were listed separately from their spouses and that the total losses to the couples were counted twice even though the couples only loaned Hartstein money once. Hartstein argued that the elimination of the challenged victims and their purported losses, and the correction of inaccurate accounting by the

government, would reduce the total loss amount by approximately $600,000.[1]

Second, Hartstein asserted that she repaid substantial sums to many of her victims/lenders and that the amounts repaid should be credited against the loss amount. According to Hartstein, this argument, if accepted by the court, would reduce the total loss amount by approximately an additional $1 million. Hartstein essentially argued that the proper amount for loss calculations was not the total amount loaned by each victim, but the net loss of principal by each victim.

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[1] Our review of summaries provided by Hartstein and government suggests that Hartstein identified approximately thirty purported victims on the government's list of victims that she argued were not victims or that had loaned her money in amounts less than the amount claimed by the government. For example, the government's list included a pawn shop and a ticket broker who were claiming an entitlement to money but who did not appear to be victims of the fraud as alleged by the government. Also, at least one of the purported victims signed an affidavit indicating that he was not a victim of fraud, was not seeking restitution, and had loaned money to Hartstein out of friendship. Hartstein also listed approximately sixteen purported victims that she claimed loaned her *more* money than stated by the government. The net result of these alleged overstatements and understatements of loan amounts and victims by the government would have reduced the total loss amount by approximately $560,000 rather than the $600,000 asserted by Hartstein. This dollar amount is independent of Hartstein's other arguments regarding credit for the repayment of loan amounts or credit for the provision of travel benefits to the victims or purported victims.

Finally, Hartstein asserted that the value of travel benefits (cruises, plane tickets, etc.) she provided to her victims in lieu of or in addition to principal repayments should be used to offset the loss amounts by an additional sum of approximately $300,000.

Based on these three categories of arguments – the fact-based challenges, the repayment credit theory, and the travel benefit theory – Hartstein provided a detailed, victim-by-victim summary of her position which she labeled "Defendant's Victim List." This list was based on the government's summary of its own position, and the list detailed purported victims' names, loan amounts, repayments, travel benefits, and the net amount still owed to each victim.[2] Defendant's Victim List also included a brief explanation following each victim to explain why, in many cases, the loan amounts differed from those claimed by the government or why Hartstein considered the lender not to be a victim.

The government responded to Hartstein's objections, and the probation office issued amendments

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[2] Hartstein argued at sentencing that the Defendant's Victim List "includes all victims who suffered actual losses and are owed restitution. This list also included the amounts each victim loaned to Hartstein, the amounts of any repayment and travel amounts, and loss amounts for each victim. There are 112 victims with losses totaling $914,885.06." This was in contrast to the government's position, as reflected in the PSR, that there were over 180 victims with a total loss in excess of $2.8 million.

and comments to the PSR, noting repeatedly that the government was prepared to offer documents and testimony at sentencing to support the asserted loss amounts. Prior to sentencing, Hartstein conducted additional investigation, and shortly before sentencing, she provided the court and the government with an amended, detailed summary of her position regarding loss amounts. In this amended summary, Hartstein listed the total loss amount as $970,000. Hartstein argued at sentencing that she should be sentenced based on this loss amount.

At sentencing, the government argued that the friends and relatives Hartstein sought to eliminate from the list of victims, and whose losses Hartstein sought to eliminate from the loss totals, were, in fact, victims of fraud notwithstanding their personal relationships with Hartstein. As to one of these individuals, the government noted that, even though Hartstein characterized the person as having loaned money as a display of love and affection, the person received a promissory note from Hartstein that was identical to notes received by other victims. The government argued categorically that all of the identified lenders were victims of a Ponzi scheme and that individual factual findings were not necessary as to each victim. The district court agreed, found Hartstein non-credible and declined the government's offer to submit evidence to prove the loss amounts.

Regarding repayments, the government alleged generally that Hartstein's scheme was a Ponzi scheme in which she paid or partially paid early

lenders with money received from subsequent lenders to assuage the earlier lenders' worries or to gain their confidence so that they would increase their own lending activities or send other potential lenders to her. Based on this argument, the government asserted that, as a matter of law, all of Hartstein's repayments to purported victims were merely instruments to perpetuate her fraud, and it would be improper to decrease the total loss amount by any sums that Hartstein repaid to the alleged victims. The government also argued that it was improper to credit against losses the value of travel benefits provided to the victims because the government had not attempted to include the value of promised travel benefits in the initial loss amounts. The government also noted that Hartstein had promised travel to her victims in addition to, not in lieu of, the return of their principal and that the goal in calculating loss amounts is not to enforce the terms of a fraudulently procured contract, but to identify the amount of the loss.

In effect, the government urged a categorical approach for the treatment of Hartstein's objections, relying on legal arguments to defeat Hartstein's challenges in the aggregate rather than focusing on specific loss amounts for each victim. The government also, however, selected certain victims as examples and addressed loss amounts related to these victims that Hartstein claimed to have repaid or repaid in part. As to some of these particular victims, the government argued that Hartstein had, in fact,

repaid them with bad checks or had not actually repaid them at all.

At sentencing, the government presented no evidence to prove the loss amounts. Rather, Hartstein and the government relied upon accounting summaries indicating their respective positions. The district court accepted the government's legal arguments, discussed the summaries, found Hartstein's summary to be inaccurate or non-credible as to certain victims who were selected as examples, and rejected all of Hartstein's arguments. Although the sentencing hearing did not involve the presentation of evidence as to loss amounts, a number of witnesses testified as to other issues. For example, a postal inspector testified as to some financial matters relevant to the question of whether Hartstein derived her means of living from the criminal activity. A victim testified as to a large loan she made to Hartstein and as to Hartstein's use of the victim's name to open credit accounts. Mental health professionals provided testimony relevant to claims by Hartstein that she committed her offense while laboring under a diminished mental capacity. U.S.S.G. § 5K2.13.

The district court found that Hartstein did not suffer any mental impairments that qualified for a departure under the Guidelines. The district court adopted the PSR recommendations except that the district court granted Hartstein a two-level reduction for acceptance of responsibility and refused to apply a two-level enhancement for abuse of a position of trust. This resulted in a total offense level of

thirty-one, criminal history category I, and an advisory Guidelines range of 108-135 months' imprisonment. The parties both agreed that, given the court's other findings as to the contested matters, this final calculation was accurate. The court then considered the other relevant sentencing factors under 18 U.S.C. § 3553(a) and sentenced Hartstein to the high end of the advisory range, 135 months' imprisonment. Finally, the court adopted the PSR recommendations as to amounts owed as restitution.

On appeal, Hartstein renews her three arguments and, in addition, argues generally that the district court failed to properly allocate the burden of proof at sentencing and failed to require the government to present evidence as to challenged factual assertions.

## II. Discussion

### A. Standard of Review and General Framework

We review a district court's interpretation of the Guidelines de novo and its findings of fact for clear error. *United States v. Holthaus,* 486 F.3d 451, 454 (8th Cir. 2007). Although a district court must make factual findings for Guidelines purposes by a preponderance of the evidence, *id.* at 453 n.2,"the damage wrought by fraud is sometimes difficult to calculate, so a district court is charged with the difficult task of making a reasonable estimate of . . . loss rather than a precise determination." *United States v. Agboola,* 417 F.3d 860, 870 (8th Cir. 2005); *see* U.S.S.G.

§ 2B1.1, comment. (n.3(C)) (stating that the sentencing court "need only make a reasonable estimate of the loss"). Further, "[t]he sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference." *Id.* Combining the Guidelines' application notes with our established standard, the sentencing court must establish a reasonable estimate of the loss based upon a preponderance of the evidence. Determination of the method for calculating a loss amount, however, remains a legal issue that we review de novo. *See United States v. Alfonso,* 479 F.3d 570, 572-74 (8th Cir. 2007) (applying de novo review to an issue of loss-calculation methodology). Also, to the extent factual findings are not based on an examination of testimony or other evidence, no deference is due.

Guidelines sections 2B1.1(b)(1)(I) to (K) provide for sixteen, eighteen, and twenty-level increases, respectively, if the total loss amounts are more than $1 million, more than $2.5 million, or more than $7 million. In the present case, we would have to accept all three of Hartstein's general categories of arguments in their entirety to find that the $970,000 loss amount advocated by Hartstein is appropriate. One of Hartstein's arguments, however, is without merit and demands little discussion: the argument regarding credits for travel benefits paid to victims. On the facts of the present case, the travel benefits were akin to interest that Hartstein promised to her lenders. The

government did not seek to include the value of promised travel benefits in the initial loss figures, and the payment of travel benefits did not in any manner restore to the victims the sums they had loaned to Hartstein.

Hartstein's concession that the overall loss amount should be in the range of $970,000 was based on her partial agreement with the government's accounting as to the original loan amounts. She does not challenge the factual basis of approximately $2.2 million of the government's asserted $2.8 loan amount figure. Her other arguments regarding repayments and travel benefits account for the difference between this $2.2 million figure and her overall asserted loss amount of $970,000. Rejection of her travel benefits argument, then, effectively adds $300,000 to Hartstein's conceded loss amount and places it well above the threshold of $1 million found in U.S.S.G. § 2B1.1(b)(1)(I), even if Hartstein were to prevail on all of her other arguments.

Given this fact, the loss calculations at hand are material to the Guidelines calculations due to the additional two-level increase that is imposed at the level of a $2.5 million loss. If Hartstein's remaining arguments – her purely factual challenges and her legal arguments regarding credits for repayments – together or independently result in an overall loss amount less than $2.5 million, Hartstein's total offense level would be twenty-nine rather than thirty-one, and her advisory Guidelines range would be

87-108 months rather than 108-135 months. We address these two remaining arguments in turn.

B. Factual Challenges

As indicated *supra* at note 1, Hartstein's purely factual challenges, if sustained in full, would eliminate approximately $560,000 from the total asserted loss amount. This challenge, then, could place the loss amount under the Guidelines threshold of $2.5 million and change the advisory Guidelines range. We hold that remand is necessary in this case because Hartstein objected to the method of calculation used in the PSR as well as the resultant loss figures, but the government presented no evidence tending to prove the challenged figures. "'If the defendant objects to any of the factual allegations contained [in the PSR] . . . , the government must present evidence at the sentencing hearing to prove the existence of the disputed facts.'" *United States v. Jenners,* 473 F.3d 894, 897-98 (8th Cir. 2007) (quoting *United States v. Poor Bear,* 359 F.3d 1038, 1041 (8th Cir. 2004)).

The government did present summary tables of its position regarding an accounting of the fraudulent loans. Summary tables of accounting data that are based on evidence not before the court, and that a party has challenged as inaccurate, are not sufficient to support a court's factual findings. *United States v. Green,* 428 F.3d 1131, 1134 (8th Cir. 2005) ("[T]he charts may 'include assumptions and conclusions, but

said assumptions and conclusions must be based upon evidence in the record.'") (quoting *United States v. Wainright,* 351 F.3d 816, 821 (8th Cir. 2003)). When challenged, the conclusions and assumptions stated in summary accounting data are not evidence in and of themselves, but are more akin to representations by litigants.

On remand, Hartstein will not be able to avoid her previous concessions, but she will be entitled to put the government to its burden of proof regarding the challenged loan amounts and the circumstances surrounding the lenders she alleges were not victims of fraud. The government need not present evidence as to each alleged victim, as Hartstein challenges neither the characterization of many of her lenders as victims nor the loan amounts claimed by the government as to many of these victims. Where the parties' figures are not in agreement, however, and where Hartstein claims a lender was not, in fact, a victim of fraud, the government must prove the loan amount and present evidence as to the circumstances surrounding the particular loan.

The government argues that Hartstein waived her ability to challenge the evidentiary basis of the district court's ruling by not sufficiently pressing the court to demand evidence from the government. In this regard, we note that, at one point during the sentencing hearing, Hartstein's counsel appeared to waive a detailed victim-by-victim examination, stating to the court, "I'm happy to go in detail through these, but I don't know that it's necessary at this

point." We find the record confusing in this regard, and we agree with the government to the extent it claims Hartstein's counsel could have more clearly and forcefully preserved her evidentiary challenge. We are convinced, however, that by the time Hartstein's counsel made the above-quoted statement, the proceeding had evolved to the point where the burden clearly and improperly, even if inadvertently, had shifted to the defendant to disprove the loss amounts asserted by the government. This shifting of the burden was improper. Although Hartstein proceeded at sentencing as though she needed to chip away at the government's final loss amount calculation, it was not her burden to disprove the final loss amount.

Because the burden should never have been shifted in this manner, we are not inclined to penalize Hartstein for not raising her evidentiary challenges more clearly or more vigorously. In short, Hartstein's concessions established a much lower loss amount than that claimed by the government. It was the government's burden to present evidence to prove a loss amount greater than Hartstein's concession. It was not Hartstein's burden to present evidence in an attempt to chip away, victim-by-victim, from the government's unproven claims.

At resentencing, it is possible that the government will present evidence sufficient to defeat Hartstein's factual challenges. As such, it is possible that the district court will find that the total amount of fraudulent loans exceeds the $2.5 million threshold.

Therefore, it remains necessary to address Hartstein's argument regarding credit for repayments.

C. Credit for Repayments

i. Fraudulent Investment Schemes, Generally

In the context of fraudulent loans or investments, it is often difficult to determine the appropriate method for calculating loss and the appropriate treatment of repayments. The parties in this case spend a good deal of effort attempting to convince us that the present crime and related conduct was or was not a Ponzi scheme based on the assumption that the general label "Ponzi scheme" concludes our analysis and is determinative as to whether repayments of principal should be credited against the victims' loan amounts. The government's theory is that, within a Ponzi scheme, the organizer of the scheme pays out principal, and possibly profit, to some victims as a means of garnering further investment, goodwill, or the referral of new victims. Alternatively, such payments may be used to grease squeaky wheels, effectively silencing victims who complain loudly and threaten to expose the scheme to investors or authorities.

We believe the parties' focus on the label "Ponzi scheme" is misplaced for two reasons. First, it is not clear that all the numerous victims in the present case were similarly situated or were victims of the same overarching fraudulent scheme. Accordingly, it

is not clear that all the victims should be treated identically in relation to the crediting of repayments against losses. Second, Ponzi schemes come in many shapes and sizes and we believe it is more appropriate to apply a nuanced approach that takes into consideration the facts of the fraud at issue. Such an approach should focus on a defendant's intent rather than make sentencing variations turn on the application of a label as vague as "Ponzi scheme."

The nature of the particular fraudulent scheme in any given case may provide great insight as to a defendant's intent. Ultimately, it is that intent, rather than assumptions about Ponzi schemes, that should control under the Guidelines, which expressly call for sentencing based on the "greater of actual loss or intended loss." U.S.S.G. § 2B1.1, comment. (n.3(A)). Because actual loss normally includes credit for repayments received prior to discovery of the crime,[3] it is intended loss rather than actual loss that typically is the focus of a sentencing court's inquiry when a court considers whether to grant credit for repayments. Because we have repeatedly characterized intended loss with reference to a defendant's actual,

[3] Actual loss typically is a net figure that looks at a victim's actual pecuniary harm resulting from the conduct, i.e., the difference between what the victim paid and what the victim recovered plus any other forms of "reasonably foreseeable pecuniary harm that resulted from the offense." U.S.S.G. § 2B1.1 comment. (n.3(A)(i)). As a general rule, repayments prior to discovery are credited against loss. *Id.* § 2B1.1 comment. (n.3(E)(i)).

subjective intent, that intent should drive our analysis. *See Holthaus,* 486 F.3d at 456 ("[T]he district court determined [the defendant's] subjective intent based on the available evidence."); *United States v. Wheeldon,* 313 F.3d 1070, 1072 n.2 (8th Cir. 2002) ("His subjective intention is to produce a certain loss. . . .").

This focus on intent to determine the proper treatment for repayments of principal in the context of fraudulent schemes is consistent with the application notes and with our prior statements about Ponzi schemes. While the general term "Ponzi scheme" refers to various configurations of investment schemes in which one victim's funds are used to pay, appease, or further entice the same victim or additional victims, the term is in such wide use in such diverse settings as to be of little practical assistance. The Guidelines themselves, in application note 3(F)(iv) to section 2B1.1, use the term "Ponzi scheme" as an illustrative example of a "fraudulent investment scheme." This application note does not define "Ponzi scheme," however, nor does it instruct courts as to whether credit should be given for pre-discovery repayments of principal to victims. Rather, it provides only that "the *gain* to an individual investor in the scheme shall not be used to offset the loss to another individual investor." *Id.* (emphasis added); *compare id.*(regarding non-credit for gains "in excess of that investor's principal investment") *with* U.S.S.G. § 2B1.1, comment. (n.3 (E)) (providing generally that

pre-discovery repayments should be credited against losses).

In a recent case, we examined the purpose of application note 3(F)(iv), and held that it also precludes the offsetting of one victim's earlier gains or profits against that same victim's own later losses. *See Alfonso,* 479 F.3d at 573 ("[W]e conclude that the district court properly declined to offset victims' gains on one investment against their losses on subsequent investments."). Our rationale in *Alfonso* was that, because the defendant's presumed purposes or subjective intentions in paying earlier gains were to solicit good will and garner further investment, he should not receive credit for the payments of gains whether made to the same victim or a different victim. *Id.*[4]

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[4] The treatment of principal repayments was not the issue before the court in *Alfonso.* Rather, the question before the court was how to treat the payment of gains. In *Alfonso,* one of the victims loaned at total of $301,000 to the defendant. *Alfonso,* 479 F.3d at 571 n.3. The defendant apparently repaid a principal amount of $36,000 from a first loan along with $8000 in gains. *Id.* The same victim then loaned the defendant an additional $265,000, of which only $110,000 in principal was repaid. *Id.* Under the government's theory of no credit for repayments, as asserted in the present case, the amount of loss in *Alfonso* would have been $301,000, the total amount loaned without credit for principal or gains paid to the victim. That approach was not used by the court in *Alfonso.* Rather, the court applied note 3(F)(iv) to section 2B1.1, refused to give credit for the $8000 of gains paid to the victim, but gave credit for the return of $147,000 of principal. *Id.* at 571 n.3 and 572-73.

In neither *Alfonso* nor any other case have we interpreted the Guidelines as precluding credit against losses for repayments of principal merely because a fraud occurred within the context of a larger scheme or Ponzi scheme. In fact, in *Alfonso* the sentencing court had given credit for repayments of principal in the context of a fraudulent scheme, and we affirmed the sentence. *See id.* at 571 n.3 and 572-73 (setting forth calculations for a particular victim, denying credit for $8000 of earlier profits, but granting credit for $147,000 of repaid principal). We also discussed this issue in a footnote in *United States v. Nichols,* 416 F.3d 811, 820 n.6 (8th Cir. 2005), but we ultimately held that, on the facts of *Nichols,* credit for repayments would not have made a difference in the Guidelines calculations. *Id.* at 820-21. Our authority, then, does not categorically preclude the treatment that Hartstein requests.

As noted in *Nichols,* many other circuits have gone further and held explicitly that repayments of investment or loan principal should not be credited against losses in the context of investment schemes where a defendant merely uses such repayments (1) to build investors' confidence thereby luring further investment, or (2) to appease noisy victims in order to avoid exposure of the scheme. *See, e.g., United States v. Deavours,* 219 F.3d 400, 403 (5th Cir. 2000) ("[The] defendants returned money to those they had defrauded, not to compensate the victims for their losses . . . but conversely to extend their criminal activities and the profitability thereof – and to place

yet more property of innocent victims at risk."); *United States v. Loayza,* 107 F.3d 257, 266 (4th Cir. 1997); *United States v. Carrozzella,* 105 F.3d 796, 805 (2d Cir. 1997) ("One reason for this rule is that . . . the return of money as interest or other income is often necessary for the scheme to continue.") (abrogated on other grounds by *United States v. Kennedy,* 233 F.3d 157, 160-61 (2d Cir. 2000)). The holdings in these cases appear to be based on general assumptions about defendants' purposes and intentions in operating investment schemes. In fact, in at least one of these cases, the court explicitly directed its attention not only at the general topic of Ponzi schemes, but specifically at the question of the defendant's intent, and what the nature of such schemes reveal about that intent. *See Loayza,* 107 F.3d at 266 ("This approach which holds a defendant responsible for the amount of loss which was intended, not the actual loss ultimately sustained, is appropriate in cases where the repayments are vital to the longevity of the scheme.").

Ultimately, we believe a focus on intent in each case is a prudent course to follow. Because the Guidelines do not define the term "Ponzi scheme," we believe it is more helpful to return to the Guidelines' basic definitions for actual and intended loss and view loss amounts related to fraudulent investment schemes from the standpoint of these basic definitions. U.S.S.G. § 2B1.1(b)(1), comment. (n.3(A)(i)) ("'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense."); *id.*

comment. (n.(3)(A)(ii)) ("'Intended loss' . . . means the pecuniary harm that was intended to result from the offense . . . and . . . includes intended pecuniary harm that would have been impossible or unlikely to occur."). These basic definitions provide a framework within which section 2B1.1 application note 3(F)(iv) (regarding fraudulent schemes) and application note 3(E) (regarding credit for repayments) can be fully understood not as stand-alone rules for application only in the context of "Ponzi schemes," but as necessary extensions of the basic definitions of actual loss and intended loss. In the present case, as in most cases involving an alleged Ponzi scheme, the particulars of the fraud will inform the sentencing court as to the defendant's intent.

In the present case, Hartstein's concessions as to numerous victims suffice to demonstrate that, at least as to several victims, she borrowed money she knew she could not repay but for the false and misplaced hope that she could perpetuate her fraud indefinitely. *See, e.g., United States v. Lauer,* 148 F.3d 766, 767 (7th Cir. 1998) ("But it is the same sense in which the author of a Ponzi scheme might not intend that any of his investors lose anything – might intend that the scheme continue until the end of the world, in which event there would be no losers."). We believe that when a defendant's only subjective intent regarding repayments relates to this illegal purpose of perpetuating the scheme, a sentencing court may refuse to credit repayments against sums received from the victims. Still, Hartstein's limited concessions

do not relieve the government of its burden of proof in this case. As to the victims where Hartstein has lodged objections and where further factual findings are required, it is also necessary to hear evidence tending to show the conditions under which Hartstein received money from the victims and to determine whether different circumstances require different treatment for repayments. If the government fails to meet its burden of proof regarding the defendant's intent as to any particular victim or group of victims, it may be necessary to rely on the amount of the actual loss (principal that was not repaid).

## III. Conclusion

Finally, Hartstein challenges the district court's application of enhancements under the Guidelines for use of sophisticated means and unauthorized use of a means of identification. She also argues that the restitution order involved a violation of *United States v. Booker,* 453 U.S. 220 (2005), and that the district court committed clear error regarding its findings as to Hartstein's mental health. We find these arguments to be without merit. We have previously held that restitution orders do not raise *Booker* concerns. *United States v. Carruth,* 418 F.3d 900, 904 (8th Cir. 2005). Further, the district court's findings as to the challenged enhancements and mental health issues were well-supported by the evidence presented during sentencing and were not clearly erroneous.

For the foregoing reasons, however, we vacate the sentence and restitution order and remand for the presentation of evidence relevant to loss amounts, further factfinding, and resentencing. We note that, on remand, the district court need not ignore Hartstein's prior concessions as to loss amounts. By our account, without credit for the payment of travel benefits, these concessions place the loss amount well in excess of $1 million, *see* U.S.S.G. § 2B1.1(b)(1)(I), but possibly below $2.5 million, *see* U.S.S.G. § 2B1.1(b)(1)(J).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | |
| v. | ) | No. 4:05-CR-186 (CEJ) |
| KAREN HARTSTEIN, | ) | |
| Defendant. | ) | |

**ORDER**

(Filed Aug. 15, 2006)

This matter is before the Court upon the defendant's motion to correct the restitution portion of the sentence. Rule 35(a) of the Federal Rules of Criminal Procedure allows a court to correct a sentence that resulted from an arithmetical, technical or other clear error. Here, the defendant asserts that the restitution amount was incorrectly calculated because it did not take into account repayments that she made to some of the victims and because it included amounts owed to individuals and entities whom she contends were not victims.

Prior to sentencing the defendant advanced a theory for calculating the amount of loss and restitution. Her present motion is merely a reassertion of that theory. Additionally, the motion contains factual allegations that defendant could have made before sentencing and, in some instances, actually repeats

allegations she made earlier. Because it does not appear that the motion to correct is based on arithmetical, technical or other clear error, the defendant is not entitled to relief.

Accordingly,

**IT IS HEREBY ORDERED** that the defendant's motion to correct sentence [#134] is **denied**.

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES
DISTRICT JUDGE

Dated this 15th day of August, 2006.

**United States District Court**
Eastern District of Missouri
(Filed Jul. 19, 2006)

UNITED STATES OF AMERICA

v.

KAREN HARTSTEIN

Date of Original Judgment: July 13, 2006
(Or date of last Amended Judgment)

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 4:05 CR186 CEJ

USM Number: 31786-044

Stephen Welby and Adam Fein
Defendant's Attorney

**Reason for Amendment:**

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. §§ 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant to
  ☐ 28 U.S.C. § 2255 or
  ☐ 18 U.S.C. § 3559(c)(7)

☒ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☒ pleaded guilty to count(s) 18 (Eighteen) and 49 (Forty-nine) of the Indictment on February 17, 2006

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 USC § 1341 | Mail Fraud | March 12, 2004 | 18 (Eighteen) |
| 18 USC § 1029(a)(2) | Unauthorized Use of a Credit Card | January 20, 2004 | 49 (Forty-nine) |

The defendant is sentenced as provided pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)___

☒ Count(s) 1-17, 19-48, and 50-53 are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this

district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July13, 2006
Date of Imposition of Judgment

/s/ Carol E. Jackson
Signature of Judge

CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE
Name & Title of Judge

July 19, 2006
Date signed

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 135 months.

This term consists of a term of 135 months as to Count 18 (Eighteen) and a term of 120 months as to Count 49 (Forty-nine), all such terms to be served concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:

The defendant shall participate in the Financial Responsibility Program while incarcerated and the defendant shall be assigned to the Greenville Facility, to the extent that these recommendations are consistent with the policies of the United States Bureau of Prisons.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ a.m./p.m. on _____

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☒ as notified by the United States Marshal

☐ as notified by the Probation or Pretrial Services Office

MARSHALS RETURN
MADE ON SEPARATE PAGE

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

This term consists of a term of three years as to each of Counts 18 (Eighteen) and 49 (Forty-nine), all such terms to be served concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable).

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record

or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL STANDARD
CONDITIONS OF SUPERVISION

WHILE ON SUPERVISED RELEASE, THE DEFENDANT SHALL COMPLY WITH THE STANDARD CONDITIONS THAT HAVE BEEN ADOPTED BY THIS COURT AS WELL AS THE FOLLOWING ADDITIONAL CONDITIONS:

1. THE DEFENDANT SHALL PARTICIPATE IN A MENTAL HEALTH PROGRAM AS APPROVED BY THE UNITED STATES PROBATION OFFICE. THE DEFENDANT SHALL PAY FOR THE COSTS ASSOCIATED WITH THE SERVICES PROVIDED BASED ON A CO-PAYMENT FEE ESTABLISHED BY THE UNITED STATES PROBATION OFFICE. CO-PAYMENTS SHALL NEVER EXCEED THE TOTAL COST OF SERVICES PROVIDED.

2. THE DEFENDANT SHALL PROVIDE THE PROBATION OFFICER AND THE FINANCIAL LITIGATION UNIT (FLU) OF THE UNITED STATES ATTORNEY'S OFFICE WITH THE ACCESS TO ANY REQUESTED FINANCIAL INFORMATION, THE DEFENDANT IS ADVISED THAT THE PROBATION OFFICE MAY SHARE FINANCIAL INFORMATION WITH THE FLU.

3. THE DEFENDANT SHALL BE PROHIBITED FROM INCURRING NEW CREDIT CHARGES OR OPENING ADDITIONAL LINES OF CREDIT WITHOUT THE APPROVAL OF THE UNITED STATES PROBATION OFFICE SO LONG AS THERE IS A BALANCE ON THE COURT-IMPOSED FINANCIAL OBLIGATION.

4. THE DEFENDANT SHALL APPLY ALL MONIES RECEIVED FROM INCOME TAX REFUNDS, LOTTERY WINNINGS, JUDGMENTS, AND/OR OTHER ANTICIPATED OR UNEXPECTED FINANCIAL GAINS TO THE OUTSTANDING COURT-ORDERED FINANCIAL OBLIGATION. THE DEFENDANT SHALL IMMEDIATELY NOTIFY THE PROBATION OFFICER OF THE RECEIPT OF ANY INDICATED MONIES.

5. THE DEFENDANT SHALL PAY THE RESTITUTION AS PREVIOUSLY ORDERED BY THE COURT.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6

| | Assessment | Fine | Restitution |
|---|---|---|---|
| TOTALS: | $200.00 | ____ | $2,089,255.60 |

☐ The determination of restitution is deferred until ___. *An Amended Judgment in a Criminal*

*Case* (AO 245C) will be entered after such a determination.

☒ The defendant Shall make restitution, payable through the Clerk of Court, to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| Name of Payee | Total Loss* | Restitution Ordered | Priority or Percentage |
|---|---|---|---|
| The list of victims, addresses and losses is maintained by the Financial Department | | $2,089,255.60 | |
| Totals: | _____ | $2,089,255.60 | |

☐ Restitution amount ordered pursuant to plea agreement _____

☐ The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of the

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6, may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ The interest requirement is waived for the ☐ fine and/or ☐ restitution.

☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:

ADDITIONAL TERMS FOR
CRIMINAL MONETARY PENALTIES

IT IS FURTHER ORDERED that pursuant to the Mandatory Restitution Act of 1996, the defendant shall make restitution in the total amount of $2,089,255.60. The list of victims, addresses and losses is attached separately. All criminal monetary penalties are due in full immediately. The defendant shall pay all criminal monetary penalties through the Clerk of Court. If the defendant cannot pay in full immediately, then the defendant shall make payments under the following minimum payment schedule: During incarceration, it is recommended that the defendant pay criminal monetary penalties through an installment plan in accordance with the bureau of Prisons' Inmate Financial Responsibility Program at the rate of 50% of the funds available to the defendant. If the defendant owes any criminal monetary penalties

when released from incarceration, then the defendant shall make payments in monthly installments of at least $400, or no less than 10% of the defendant's gross earnings, whichever is greater, with payments to commence no later than 30 days after release from imprisonment. Until all criminal penalties are paid in full, the defendant shall notify the Court and this district's United States Attorney's Office, Financial Litigation Unit, of any material changes in the defendant's economic circumstances that might affect the defendant's ability to pay criminal monetary penalties. The defendant shall notify this district's United States Attorney's Office, Financial Litigation Unit, of any change in mailing or residence address that occurs while any portion of the criminal monetary penalties remains unpaid.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒ Lump sum payment of $2,089,455.60 due immediately, balance due

☐ not later than _____ , or

☐ in accordance with ☐ C, ☐ D, or ☐ E below; or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ E below; or ☐ F below); or

C ☐ Payment in _____ (e.g., equal weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after Release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

**The Special Assessment of $200.00 is due in full immediately. Restitution shall be paid in accordance with the payment schedule on Page 6 of this Judgment.**

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are made to the clerk of the court.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

[United States Marshals Return Of Judgment In A Criminal Case Omitted In Printing]